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(2)

No. 08-1036

In The

Supreme Court of the United States

CARLTON SHAW,

Petitioner,

v.

BEAUFORT COUNTY SHERIFF'S OFFICE,

Respondent.

On Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was the United States Court of Appeals for the Fourth Circuit correct in its determination that service of process on a State officer must be accomplished in the manner specified within Fed. R. Civ. P. 4(j)(2) and Rule 4(d)(5), SCRCP, and that no other method of service upon a State officer is valid?

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STATEMENT OF THE CASE

I. Facts Relevant to the Petition

This matter arises out of alleged discriminatory employment practices by the Beaufort County Sheriff and his deputies. Specifically, the Plaintiff/Petitioner alleges that members of the Sheriff's office engaged in discriminatory and retaliatory acts, towards the Petitioner, including termination of his employment, because of his race.

The Petitioner, a black male, was hired as a Sheriff's deputy with the Beaufort County Sheriff's Office in early 2003. Following completion of the South Carolina Police Academy, the Petitioner spent two weeks of field training under the supervision of two deputies, each of whom evaluated the Petitioner's performance as substandard. Instead of terminating the Petitioner, the Sheriff assigned him to courthouse security detail. Following this appointment, the Petitioner received a substandard evaluation in shotgun training, and in a four-month span, the Petitioner received seven performance evaluations that indicated he needed improvement in his driving abilities. However, the Petitioner was eventually approved for duty in November 2003.

In March 2004, the Petitioner was injured in an automobile accident while on duty. Although the Petitioner initially visited a temporary treatment medical provider, he never visited his primary treating physician for treatment of the injuries sustained in the automobile accident, despite his superior

officers ordering him to do so. The Petitioner was terminated in December 2004 for insubordination

The EEOC provided the Petitioner with a "right to sue" letter on August 31, 2005, and the Petitioner filed a Complaint in the Beaufort Division of the United States District Court for the District of South Carolina on November 21, 2005, and an Amended Complaint on March 24, 2006. The Petitioner sent the Complaint to the Respondent via certified mail, and did not personally serve the Sheriff or his clerk (although in his Petition, the Petitioner appears to imply that personal service was effected, he has previously stipulated that no personal service occurred). Finally, the Respondent denies all allegations within the Petition of racial discrimination by any member of the Beaufort County Sheriff's Office.

II. Procedural History and Opinions Below

As previously stated, the Petitioner obtained the requisite "right to sue" letter from the EEOC and filed his Complaint on November 21, 2005, and amended the Complaint on March 24, 2006. The Defendant/Respondent moved for Summary Judgment on several grounds, including improper service. The Honorable George S. Kosko, United States Magistrate Judge, issued a report recommending the Defendant/Respondent's Summary Judgment Motion be granted. The United States District Court, The Honorable Sol Blatt, Jr. presiding, in an Order dated September 27, 2007, adopted the Magistrate's Report

and Recommendation and granted Summary Judgment in favor of the Defendant/Respondent.

The Fourth Circuit Court of Appeals affirmed the District Court's ruling in an Order dated November 13, 2008, and without oral argument.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE PETITIONER FAILED TO FOLLOW THE WELL-ESTABLISHED RULES REGARDING SERVICE OF PROCESS FOR STATE AGENCIES AND OFFICIALS.

I. Timely Service

"A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. The Petitioner is correct that he met this threshold requirement. However, Rule 3 must be read together with Fed. R. Civ. P. 4, which establishes a 120-day limit for service upon a Defendant and places the burden for service upon the Plaintiff. "The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m). . . ." *Id.* This is where the Petitioner failed.

No proof exists that the Petitioner ever delivered, by any conveyance, the original Complaint to the Respondent. The Petitioner admitted in his Joint Factual Brief that he did not serve the Sheriff or his clerk. Although he attempted delivery of the

Amended Complaint by certified mail, this method of service is improper. The Respondent timely objected to this method of service in its Answer and perfected its objection by the Motion for Summary Judgment.

The District Court may extend the time for serving process upon a showing of good cause. Fed. R. Civ. P. 4(m). However, despite being on notice of the Respondent's position, there is nothing in the record to indicate the Petitioner asked the Court to extend the time for service. Further, there is no evidence in the record to indicate the Petitioner asked the Respondent to accept service of either the Complaint or Amended Complaint, as contemplated by Fed. R. Civ. P. 4(d).

The Fourth Circuit Court of Appeals correctly affirmed the District Court's finding that the Petitioner failed to timely serve the Complaint.

II. Proper Service

A. The Beaufort County Sheriff and his deputies are State Officers.

The District Court correctly determined, and the Fourth Circuit affirmed, that the Respondent is a State officer or agency. In South Carolina, Sheriffs and their deputies are State officials, not county agents. *Cone v. Nettles*, 308 S.C. 109, 112, 417 S.E.2d 523, 524 (1992). "[I]t is well established in South Carolina case law that law enforcement at the county level is the exclusive province of the sheriff." *Patel v. McIntyre*, 667 F. Supp. 1131, 1146 (D.S.C. 1987).

The office of the Beaufort County Sheriff is established by the South Carolina Constitution. S.C. Const. Ann. Art. V, §24. Therefore, the Sheriff, along with his deputies, are state officers. "[T]he threshold issue here is whether sheriffs and deputies are state officials. We hold they are." *Cone* at 112.

Although the Petitioner appears to concede that that Sheriff himself is a State official, he asserts that he sued the Office of the Sheriff, not the individual. He claims this distinction allows him to treat the Sheriff's Office as an arm of the county or as a municipal corporation. The law of South Carolina simply cannot be twisted to produce such a result.

In support of his position, the Petitioner cites a workers' compensation case from 1943 and a 1920 case interpreting the South Carolina Code of Laws of 1912. However, these decisions are not applicable to the case at bar.

The issue in the workers' compensation case was not whether a deputy was a county or state official, but rather whether a deputy is the Sheriff's alter ego. *Willis v. Aiken County*, 203 S.C. 96, 26 S.E.2d 313, 315 (1943). Moreover, the statute cited in the decision states, in part, "the term 'employee' shall include all officers and employees of the State . . . " *Willis*, 203 S.C. 96, 26 S.E.2d at 314. Therefore, the Court's decision was not affected by the status of a deputy as a state or county official.

Finally, legislation enacted in 1962, and contained within the South Carolina Code of Laws of

1976, clarified the powers and form of South Carolina county and municipal government. This legislation, now contained within S.C. Code Ann. §4-9-10, *et seq.*, establishes the form and structure of county government and restricts counties from exercising any authority over a Sheriff. "With the exception of organizational policies established by the governing body, the county administrator shall exercise no authority over any elected official of the county whose offices were created either by the Constitution or by the general law of the State." S.C. Code Ann. §4-9-650 (1976).

The federal Courts recognized this distinction early on:

> It has long been clear that the County has no authority over the Sheriff or his deputies as to the matters of hiring, firing, training, discipline or the manner in which the duties of the office are carried out. The sheriff in South Carolina has under common law and statutes always been solely responsible for his own acts and those of his deputies.

Allen v. Fidelity & Deposit Co., 515 F. Supp. 1185, 1190 (D.S.C. 1981).

The Petitioner's attempt to distinguish the term "Sheriff's Office" from that of the Sheriff himself is unavailing. It is patently clear that the Sheriff's office exists only as a mechanism for the Sheriff and his deputies to execute their duties as outlined in the South Carolina Constitution and Code of Laws. The Petitioner's argument is simply without merit. Given

the wealth of federal and South Carolina authority cited herein, there can be no doubt that the Sheriff's Office, consisting entirely of state officials, is a State agency.

B. Service of process may not be accomplished by mail.

According to the Federal Rules of Civil Procedure:

> A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:
>
> (A) delivering a copy of the summons and of the complaint to its chief executive officer; or
>
> (B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

Fed. R. Civ. P. 4(j)(2).

The Petitioner's attorney simply sent the Summons and Complaint to the Respondent via certified mail. The Federal Rules require delivery to the Respondent's chief executive officer. The Rules are clear that delivery does not include mailing.

The second paragraph of the Rule allows the Petitioner to resort to the State Rules. However, even under the South Carolina Rules of Civil Procedure, the Petitioner failed to properly serve the Respondent. Rule 4(d)(5), SCRCP, states, in part: "(5) *State Officer*

or Agency. Upon an officer or agency of the State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia. . . ."

Under either Rule, the Petitioner failed to properly serve the Respondent, and the lower Courts were correct to so find.

Even if the Court views this issue in light of the Petitioner's assertion that the Office of the Sheriff is a county or municipal corporation, the analysis fails. Federal Rule 4(j)(2) still requires personal service. The South Carolina Rules are equally unavailing. Rule 4(d)(6), SCRCP, mandates service "Upon a municipal corporation, county or other governmental or political subdivision subject to suit, by delivering a copy of the summons and complaint to the chief executive officer or clerk thereof. . . ."

By the Petitioner's own admission, he failed to personally serve the Respondent. The Rules require that he do so. The District Court's conclusion was correct, the Fourth Circuit Court of Appeals properly affirmed, and this Supreme Court should deny the Petition for Writ of Certiorari.

CONCLUSION

Despite the Petitioner's attempt to muddy the clear waters of law regarding the requirements for service of a summons and complaint on a Sheriff or his deputies, his argument is unavailing. South Carolina law clearly states that Sheriffs and their deputies are State officials. Moreover, there is no applicable case law that supports the idea that the Office of the Sheriff is a county body. Therefore, service must be effected through the plainly-stated rules established for service on state officials and agencies. As the Petitioner failed to follow these well-established rules, the District Court correctly granted Summary Judgment and the Court of Appeals properly affirmed. This Court should therefore deny the Petition for Writ of Certiorari.

Respectfully submitted,

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